No. 80-1096

In the Supreme Court of the United States

OCTOBER TERM, 1980

LEONARD AIKEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the prosecutor abridged petitioner's Sixth Amendment right to the assistance of counsel by interviewing petitioner before he had been indicted and after twice admonishing him that he could have an attorney's help during questioning.

2. Whether petitioner was entitled to a pretrial hearing on the reliability of the government witnesses' identifications of voices on tape recordings.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1980. The petition for a writ of certiorari was filed on January 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute heroin and cocaine and to possess those drugs with intent to distribute, in violation of 21 U.S.C. 846. He was sentenced to 20 years' imprisonment pursuant to 21 U.S.C. 841(b)(1)(A) and 851 (Pet. App. 2a). The court of appeals affirmed (Pet. App. 1a-5a).

1. The evidence at trial showed that in January 1979 a New York City narcotics detective arrested David Reeves for narcotics violations. Shortly thereafter Reeves became a confidential informant for the Drug Enforcement Administration, which was investigating a narcotics distribution network in Harlem (A. 401, 403-405, 551-552).[1]

On the basis of Reeves' cooperation, the DEA began to focus on two of Reeves' prior drug connections: petitioner, known as "Leon" Aiken, and "Skippy" Starckey, the owner of a Manhattan bar (A. 377-378, 406-411). On April 12, 1979, agents sent Reeves to the bar after they had equipped him with a miniature recorder and radio transmitter (A. 412-414). Soon after Reeves entered the club, police officers surveilling the bar observed petitioner's car parked nearby and saw a male who resembled petitioner enter the club (A. 415).

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[1] "A." refers to the two-volume joint appendix submitted to the Second Circuit (see Pet. 2 n.1).

Tape recordings of subsequent conversations inside the bar formed the bulk of the government's evidence at trial. The April 12th tape recorded Reeves and Starckey discussing a proposed drug transaction in which petitioner would sell Reeves four ounces of heroin at $1,700 an ounce (A. 30-38, 572-573 1064, GX 2, 2B). On an April 18th tape, petitioner told Reeves to see Starckey at 8 o'clock that evening to discuss petitioner's price for the four ounces (A. 39-43, 1050-1055, GX 3, 3A). Reeves returned later that night and met Starckey, who informed him that petitioner had had difficulty taking delivery of the heroin and that Reeves would have to return the following day (GX 3, 3B).

The next day Reeves returned to the bar but again failed to get delivery from petitioner. Starckey explained that petitioner had other customers waiting in addition to Reeves (A. 422-426, GX 4). Reeves departed without any drugs and was murdered two weeks later (A. 78-79).

2. On January 7, 1980, a warrant was issued for petitioner's arrest based on a complaint charging him with conspiracy to distribute heroin. Petitioner thereafter contacted an attorney who arranged for his surrender to Detective John DeRosa on February 5, 1980 (A. 1, 134-135, 195).

When petitioner surrendered, DeRosa's associate, Police Officer Parker, immediately advised him of his *Miranda* rights, including his right to have an attorney present during any questioning (A. 195-197). Petitioner was routinely processed by the DEA and taken to an Assistant United States Attorney's office (A. 631-632).[2] Before interviewing peti-

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[2]The Assistant United States Attorney had notified petitioner's attorney earlier that morning that he would question petitioner briefly before the arraignment. According to the government's witnesses, petitioner's attorney made no request that the government refrain from questioning petitioner in his absence (A. 97, 193-194, 218-219, 224). Petitioner's counsel testified that he had instructed DeRosa to restrict his questioning to pedigree and avoid the charges at issue, and that DeRosa had agreed (A. 135). Counsel acknowledged that he made no similar request of the prosecutor (A. 138).

tioner, however, the Assistant again read petitioner his *Miranda* rights, and petitioner affirmatively acknowledged that he understood his rights. Petitioner agreed to answer questions without his attorney present after he acknowledged that he knew his attorney would arrive in a few minutes for his arraignment (A. 97, 180-181, 222-224).

In the brief interview that followed, petitioner answered background questions concerning his financial status, medical condition, employment history, and criminal record. At the end of the interview the Assistant United States Attorney suggested that petitioner consider cooperating with federal authorities and showed petitioner a copy of the complaint. Petitioner then volunteered that he knew he was "in trouble" (A. 224-229).

Petitioner was escorted to the Pretrial Services Agency and later to the Magistrate's courtroom. At one point, while petitioner and the escorting officer were walking in the courthouse corridor, petitioner volunteered that if he weren't "so old" he would "still be running" (A. 248-251, 634-635).

Petitioner was indicted on February 7, 1980 (A. 1). Prior to trial, petitioner moved to suppress his February 5 statements to the prosecutor and the escorting officer. The district court denied the motion (A. 282-298). The court of appeals affirmed petitioner's conviction (Pet. App. 1a-5a).

ARGUMENT

1. Petitioner contends (Pet. 12-19) that the district court erred in refusing to suppress his post-arrest statements because they were obtained in violation of his Sixth Amendment rights. There is no merit to this claim.

a. As explained below (pages 5-7), petitioner's Sixth Amendment right to counsel had not, in our view, attached at the time he made the statements in question; but in any event, as both courts below correctly concluded, petitioner

knowingly and voluntarily waived any Sixth Amendment right he may have enjoyed. See *Faretta* v. *California*, 422 U.S. 806, 835 (1975); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).[3]

Petitioner cites (Pet. 17-18) a number of cases for the proposition that the government must meet a higher standard of proof where a waiver of Sixth Amendment rights is claimed than is required with respect to a claimed waiver of Fifth Amendment rights. All of the cited cases are from the circuit that rendered the decision in this case; and the opinion in *United States* v. *Mohabir*, 624 F. 2d 1140 (2d Cir. 1980), the decision on which petitioner relies most heavily (Pet. 18), was written by a member of the panel in the present case. The question, then, is whether the court of appeals applied its own precedents correctly.

It seems clear that the standard enunciated by the Second Circuit was met here. See also *United States* v. *Brown*, 569 F. 2d 236 (5th Cir. 1978) (en banc). Petitioner was specifically advised by the Assistant United States Attorney of his right to have counsel present during questioning; he had already retained counsel and thus knew that he had an attorney who could be present with him during questioning if he chose to answer questions but wished to postpone the interview; and he was familiar with criminal procedures as a result of his three prior convictions (Pet. App. 3a). Petitioner nevertheless responded to the Assistant United States Attorney's assurance that he could refrain from answering questions without the presence of his attorney by

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[3]In fact, petitioner's Sixth Amendment rights are not implicated at all by his spontaneous admission to the police officer in the corridor (page 3, *supra*), since that statement was neither solicited nor even arguably responsive to any question or remark of the officer. (Petitioner made this remark just after the officer observed that petitioner's bail situation would be more favorable because he had surrendered (Pet. App. 2a-3a, A. 286).) See *Rhode Island* v. *Innis*, 446 U.S. 291 (1980); *Brewer* v. *Williams*, 430 U.S. 387, 400 (1977).

simply stating that he would answer questions.[4] As the court of appeals noted (Pet. App. 3a), there was no evidence that petitioner was "under pressure or severe emotional strain," so there was no reason not to take petitioner at his word. Even assuming, however, that there are any inconsistencies between the decision in this case and previous decisions of the Second Circuit, further review is inappropriate since this Court generally does not grant certiorari to resolve intracircuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).[5]

b. The Sixth Amendment right to counsel attaches only at critical stages of the prosecution, *i.e.*, at those stages after adversary proceedings have been initiated. See, *e.g.*, *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Hamilton* v. *Alabama*, 368 U.S. 52, 54 (1961); *United States* v. *Wade*, 388 U.S. 218 (1967); *Coleman* v. *Alabama*, 399 U.S. 1 (1970). The reason for recognizing the right to counsel at that time is to ensure that an individual, once accused, may secure assistance in

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[4]The case is therefore unlike *Brewer* v. *Williams*, *supra*, in which the defendant had stated to officers that he would tell his story *after* he saw his attorney in Des Moines. 430 U.S. at 405. Also, unlike *Brewer* (430 U.S. at 394, 405), it was not established here that any agreement had been made not to question petitioner in the absence of his counsel. The district court credited the testimony of Detective DeRosa that petitioner's surrender was not conditioned on any such agreement (A. 294); and petitioner's counsel acknowledged that he had spoken with the Assistant United States Attorney on the case at least twice, had informed the Assistant that he would not accompany petitioner during pre-arraignment procedures, and had made no request that petitioner not be questioned (Pet. 13-14).

[5]Even assuming, contrary to our view, that a violation of a bar disciplinary rule can be grounds for suppression of evidence, petitioner's reliance on Disciplinary Rule 7-104(A)(1) of the ABA Code of Professional Responsibility is ill-founded, since, owing to the Assistant United States Attorney's conversations with petitioner's counsel, the Assistant could reasonably believe that counsel had no objection to the Assistant's conducting a standard pre-arraignment interview with petitioner before his counsel arrived for the arraignment.

coping with legal procedures and in equalizing the balance between his own resources and those of the state. *United States* v. *Ash*, 413 U.S. 300, 307-309 (1973). Whether or not a stage in the proceedings is "critical," and therefore requires the assistance of counsel, depends on whether the government has committed itself to prosecute. As the plurality opinion noted in *Kirby* v. *Illinois*, 406 U.S. 682, 689-690 (1972) (citations omitted):

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

See also *Brewer* v. *Williams*, *supra*, 430 U.S. at 398-399; *United States* v. *Woods*, 613 F. 2d 629, 634 (6th Cir.), cert. denied, 446 U.S. 920 (1980).

Here, although the court of appeals found it unnecessary to determine whether the district court had erred in holding that petitioner's right of counsel had attached at the time of his statements (Pet. App. 3a), it correctly noted that the district court's holding "goes beyond [the Second Circuit's] decision in *United States* v. *Mohabir*," *supra*, and suggested that it was inconsistent with *United States* v. *Duvall*, 537 F. 2d 15, 20-22 (2d Cir.), cert. denied, 426 U.S. 950 (1976). In *Mohabir*, the court had noted (624 F. 2d at 1148-1149) that the return of an indictment marks the critical point: questioning that occurs after indictment will be presumed to be for the purpose of building the government's case

to be for the purpose of building the governments case against the defendant, but pre-indictment questioning can serve merely to determine whether any crime has occurred or to absolve a suspect. In *Duvall,* the court held that the issuance of a complaint pursuant to Fed. R. Crim. P. 3 before the defendant's arrest did not trigger a Sixth Amendment right to counsel, since a complaint merely serves the same function (with or without attached affidavits) as an affidavit drafted to support an application for an arrest warrant. 537 F. 2d at 20-22. That reasoning is fully applicable here. Moreover, a complaint and arrest do not signify an actual commencement of a criminal prosecution, because a complaint may be filed without a prosecutor's involvement and may be dropped without a court's approval, and it therefore does not operate in a fashion materially different from an arrest alone with regard to the government's commitment to prosecute the individual arrested.

In any event, because, as shown above, petitioner clearly waived any Sixth Amendment right he may have enjoyed, the question whether his right had attached before he made the statements he sought to suppress is not presented on this record.

2. Petitioner's voice on the tapes was identified at trial by Detective DeRosa and by Officer Ripandelli, both of whom had become familiar with petitioner's voice after his arrest (A. 155-159, 249-252, 435-436, 439-467, 635-638).[6] Petitioner contends (Pet. 19-21) that the district court erred in refusing to conduct a pretrial hearing to determine the reliability of these witnesses' voice identifications. He argues that due process requires a hearing similar to the hearings on the reliability of visual identifications, which

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[6]Circumstantial evidence, as well, demonstrated that petitioner was a speaker on the tapes. The persons to whom Reeves was talking on the tapes were addressed as "Leon" and "Skippy." Although petitioner's true name is Leonard, his automobile was registered in the name "Leon" at his Teaneck, New Jersey home (A. 406-407).

were encouraged by courts of appeals following this Court's decision in *Stovall* v. *Denno*, 388 U.S. 293 (1967). See, *e.g.*, *United States* v. *Mitchell*, 540 F. 2d 1163 (3d Cir. 1976); *United States* v. *Cranson*, 453 F. 2d 123 (4th Cir. 1971). Petitioner's argument fails, however, in light of this Court's recent decision in *Watkins* v. *Sowders*, No. 79-5949 (Jan. 13, 1981).

As the Court held in *Watkins*, the Constitution does not require that there be, in every case, a judicial determination, outside the presence of the jury, of the admissibility of identification evidence. For "[i]t is the reliability of identification evidence that primarily determines its admissibility * * *. And the proper evaluation of evidence under the instructions of the trial judge is the very task our system must assume juries can perform." Slip op. 6-7 (citations omitted). The Court further suggested (*id.* at 7-8) that although cases might arise in which a judicial hearing outside the jury's presence would be required, this would not generally be so where the reliability of the identification could be fully tested by cross-examination.

Just as due process does not inevitably require a pretrial hearing on the reliability of eyewitness identifications, so it does not require such a hearing on voice identifications. In the present case the jury was made aware of all factors pertinent to petitioner's argument that the identification was the product of suggestive circumstances and was therefore unreliable; and the detective and the police officer who identified petitioner's voice were thoroughly cross-examined on the reliability of their identifications. Under *Watkins*, due process does not require more.[7]

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[7]Petitioner's reliance (Pet. 20-21) on *United States* v. *Pheaster*, 544 F. 2d 353 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977), as a conflicting decision is misplaced, because *Pheaster* concerns the standards for determining what is suggestive, not the procedures to be used. Thus, although its holding that the standards governing eyewitness identifications are also applicable to voice identifications may conflict

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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with *United States* v. *Albergo*, 539 F. 2d 860, 863-864 (2d Cir.), cert. denied, 429 U.S. 1000 (1976) (standards for the reliability of voice identifications similar to those for document authentication). *Pheaster* has no bearing on the question whether there should be a pretrial determination by the court. In any event, *Watkins* v. *Sowders*, *supra*, now states the applicable rule for the latter question.

Petitioner does not present, as an independent question for review, his contention that the identifications were impermissibly suggestive, and he fails to explain in what particular way the circumstances of the identification were improper. We do not concede that admission of the identifications was unconstitutional even under *Pheaster*.

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